

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 24 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0095-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MICHAEL ALLEN LEOVITZ,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20071263 and CR20072321 (Consolidated)

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Michael A. Lebovitz

Tucson  
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner Michael Lebovitz challenges the trial court's summary denial of his second petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.,

in which he alleged ineffective assistance of Rule 32 counsel. We grant review, and for the following reasons, we deny relief.

¶2 Pursuant to a plea agreement, Lebovitz was convicted of attempted kidnapping and sexual conduct with a minor. The trial court imposed consecutive, substantially aggravated prison terms totaling 10.75 years and ordered Lebovitz to pay restitution in the amount of \$32,400.56. In his first, of-right Rule 32 proceeding, Lebovitz, through counsel, had argued his trial counsel had been ineffective in failing to challenge the restitution award the court imposed. Although the victims' restitution claim form and the presentence report suggested they were entitled to \$32,400.56, Lebovitz maintained the sum of receipts documenting the victims' expenses, minus the amount paid by their insurance, was \$29,423.09, a difference of \$2,977.47. He also argued the victims' claimed losses had been subject to challenge on the ground they had not been caused by his criminal conduct. *See* A.R.S. § 13-804(B) (in ordering restitution, "court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted"). The court summarily denied relief, finding that, under the terms of his plea agreement, Lebovitz had "waived a right to an evidentiary hearing" on the issue of restitution and had agreed the victims' restitution claim form would be accepted as "conclusive proof of the victims' economic loss."<sup>1</sup> We denied relief on review. *State v. Lebovitz*, No. 2 CA-CR 2008-0243-PR (memorandum decision filed Feb. 13, 2009).

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<sup>1</sup>The plea agreement further provided that the restitution award would not exceed \$50,000.

¶3 Lebovitz then initiated a second post-conviction relief proceeding, in propria persona, in which he alleged ineffective assistance of his of-right Rule 32 counsel. In his second petition, Lebovitz cited a presentence minute entry granting his trial counsel leave to “file documentation with the Court should there be any discrepancies in the defendant’s presentence report and restitution amounts owed to the victim.” Although Lebovitz stated he agreed with the argument Rule 32 counsel had made on his behalf, he nonetheless maintained counsel had rendered ineffective assistance because he had not drawn this minute entry to the trial court’s attention. According to Lebovitz, his claim of ineffective assistance of trial counsel “was only denied because the evidence of this court order” was not raised by his Rule 32 counsel.

¶4 The trial court found Lebovitz had failed to state a colorable claim of ineffective assistance of Rule 32 counsel and summarily denied relief. Specifically, the court found “it was not objectively unreasonable for Rule 32 counsel [to] presume that the court was aware of th[e] order” and, because the court “had access to all records and files in the matter,” Lebovitz’s Rule 32 counsel “did not need to bring [the order] to the court’s attention.” The court also found Lebovitz had failed to demonstrate how counsel’s allegedly deficient performance had prejudiced him.

¶5 In his petition for review, Lebovitz argues the trial court erred by denying relief without an evidentiary hearing because he had presented a claim “that might have changed the outcome of his Rule 32 ‘of right’” proceeding. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim “one that, if the allegations are true, might have changed the outcome” of the challenged proceeding). Relying on

*State v. Lewus*, 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992), Lebovitz asserts that the court's October 29, 2007, order had "re-affirmed [his] due process right to challenge any amount over and above what the victim would legally be entitled to receive"<sup>2</sup> and that his Rule 32 counsel's failure to cite the order constituted ineffective assistance.

¶6 We will not disturb a trial court's summary denial of post-conviction relief unless the court has abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Like the ultimate decision to grant or deny post-conviction relief, whether a claim is colorable and thus warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). "To avoid summary dismissal . . . on a post-conviction claim of ineffective assistance of counsel, [a d]efendant must present a colorable claim (1) that counsel's representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel's deficient performance." *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996), *citing* Ariz. R. Crim. P. 32.6 ("court shall order . . . petition dismissed" if claims present no "material issue of fact or law which would entitle defendant to relief"), 32.8 (evidentiary hearing required "to determine issues of material fact"); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on claim of ineffective assistance of counsel, defendant must show both deficient performance and resulting prejudice). A defendant's failure to establish either part of the

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<sup>2</sup>Although we agree that "[a] defendant has a due process right to contest the information on which the amount of a restitution order is based," that right may be waived. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992).

*Strickland* test is fatal to a claim of ineffective assistance of counsel. See *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶7 On review, Lebovitz directs most of his arguments to the prejudice element of this analysis and does little to challenge the trial court’s ruling that, even taking his allegations as true, his Rule 32 counsel “did not perform below an objectively reasonable standard.” To support his conclusory assertion that Rule 32 counsel’s performance was deficient, Lebovitz relies only on *State v. Jessen*, 130 Ariz. 1, 8, 633 P.2d 410, 417 (1981), in which our supreme court noted “the responsibility of appellant’s counsel to ensure that any document necessary to his client’s argument was in the record on appeal.” But here, as the trial court made clear, the minute entry was included in the record and, presumably, within the court’s knowledge. As Lebovitz implicitly acknowledges, his Rule 32 counsel had argued that Lebovitz had a right “to contest information on which amount of restitution order is based,” including the discrepancy Lebovitz cited in his second petition for post-conviction relief. Counsel also provided the court with detailed exhibits to document the claimed discrepancy.

¶8 Although citation to the trial court’s October 29, 2007, minute entry might have lent support to Rule 32 counsel’s argument, nothing in the record suggests that counsel’s representation fell below constitutional standards. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (Sixth Amendment guarantees right to effective representation, not mistake-free representation); *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (defendants “not guaranteed perfect counsel, only competent counsel”), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d

1149, 1151 (1995). We therefore find no abuse of discretion in the court's determination that Lebovitz failed to state a colorable ineffective assistance of counsel claim.

¶9 Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge